IN THE MATTER

of

the Status

of

William Hohenzollern, Kaiser of Germany,

Under International Law.

(Supplement)

December 20, 1918.

Hon. David Lloyd George,
Premier of Great Britain,
Government Offices,
Downing Street,
London, England.

Dear Sir:

Supplementing my letter to you of November 27, 1918, relating to the status of the German Emperor under international law, it would appear that the plan therein indicated of trying the Kaiser before an international tribunal for breaches of the rules of war formerly laid down by the Hague Conferences might be properly modified as follows:

If the Allied nations, by reason of the two conditions attached to the Hague Declarations of a limitation of seven years and a provision that they should only apply to wars between nations signing the declaration should be loath to consider those rules established as unquestionable moral truths and laws, that then it would be entirely competent for the Allied Nations to call a Conference of the allied and neutral nations represented in the former Hague Conferences, and thereupon to re-enact those rules as laws, attaching penalties, and thereupon create the international court referred to with jurisdiction to try the case. This course would be amply sustained by the following argument:

Human activities in the sphere of municipal law covering actions within and subject to a sovereignty may be called "Field A". Human activities in the sphere of international law covering activities occurring between sovereignties may be called "Field B".

When operating in "Field A", human activities are curbed and controlled by moral rules and æsthetic principles, many of which have passed into laws with sanctions and penalties. Under this province, murder is a crime punishable with death.

When operating in "Field B", human activities are uncurbed and uncontrolled by any rules of law in the strict sense,—there being no central authority,—except in so far as learned jurists have argued and claimed for that province of the law a projection into its sphere of the morals and æsthetic conceptions and principles derived from municipal law. In this way this chaos in "Field B" may be said to be tempered by these rulings of great jurists, together with the codification of the same into the rules laid down by the Hague Conference. Under this province of the law, murder occurring in the course of war is not murder. But under the exceptions to this rule made by the dicta of learned jurists and the codification of these dicta in the declarations of the Hague Conference, murder occurring in the course of war under the conditions named is murder without the addition of a penalty; in other words, those acts are forbidden but no penalty prescribed.

The Kaiser, in perpetrating the various acts of frightfulness embodied in the "Spurlos versenkt" policy and his other acts which have made this war hideous, has acted on the proposition that human activities in the sphere of international law are controlled by no

principles, morals or ethics or rules of law. In other words, that this province of the law is chaos. He has used force and frightfulness without limitation. The Allies, having met him with force, have conquered him.

Before 300 years ago, the inevitable result would have been that the Kaiser would have been led in triumph behind the Chariots, and thereafter killed, probably after torture, as witness the Roman triumphs.

Within the last 300 years, no instance of such frightful barbarities exists, and, therefore, no precedent as to how such acts should be dealt with. The Allies are entitled to use in relation to the Kaiser's activities within this "Field B" of international law the same force uncontrolled by any moral or ethical principles, so far as their right so to do is involved. But the moral and ethical nature of the ideals of the Allied people prevent their armies proceeding into Germany and committing the atrocities committed by the Germans on the Belgians and on the Frenchmen of Northern France, and these same conditions likewise prevent the Allies from adopting such punishments of the Kaiser for his acts as, for instance, boiling him in oil or asphyxiating him with his own gases, or using other cruel forms, sometimes hitherto used. This because their own moral and ethical ideas, conceptions and principles derived from their municipal laws are so strong, that they cannot and should not be submerged, even though the provocation is compelling.

The Kaiser, when haled before an international tribunal such as is herein suggested, has, outside of the denial of the actual doing of the acts claimed, which must be proved against him in the ordinary way, only one defense; that is, that his trial and punishment

would be under an *ex post facto* law—a law making a crime of acts which had not hitherto been considered to be a crime.

In making this claim he will be claiming that certain principles of municipal law have been projected into international law so as to make that province of the law subject to the same moral principles as in municipal law. In so doing he would be acting in an utterly inconsistent manner, and yet appealing to the moral nature of the Allies to make out his plea, and claiming in the province of international law the existence of a limited law and order instead of chaos.

The answer of the Allies should be that they, as a majority of the individual sovereignties constituting the Society of Nations, have the right to make laws for that Society. The law making power is in the majority of the nations constituting the Society of Nations. That Body has a right to sit and now, after the event, make laws applying to these matters, and when they pass a rule and place a sanction upon it, such law becomes international law binding as such on the Society of Nations. Consequently, the majority of the nations constituting the Society of Nations may now enact the Rules of the Hague Conference and attach a penalty, and may make those rules retroactive. The fact that in so enacting these rules they would now create a new rule of law making offences which were not offences prior to the new enactment, and prescribing a penalty when no penalty had been prescribed prior to the new enactment, and thus are enacting an *ex post facto* law, does not interfere with the full effect to be given to that law, even under the principles of our municipal laws.

For the interests of the Society of Nations as a whole, and the value of the rule of law prescribed, namely, that murder, under certain conditions occurring in war, shall constitute murder, and be punishable as such, is of far more importance to the community of nations than the interests of the criminal who has committed the acts—the rule forbidding an *ex post facto* law being one founded on a policy of mercy to the criminal, and therefore being one which must yield to the greater law of the "safety of the public." The rule forbidding murder is of primary ethical importance; the rule forbidding the passage of an *ex post facto* law is of secondary ethical importance. The latter must yield to the former when their clash imperils the greater interests of the community involved.

For instance, under municipal laws, while the American law making powers, the Congress of the United States and the Legislatures of the several sovereign states, are generally, by written constitutions, forbidden to make an *ex post facto* law, this prohibition does not extend to the English constitution, and there is no prohibition in England against this class of legislation. Just as Parliament is fully entitled to pass an *ex post facto* law, so is this new Parliament of Nations embraced in the Society of Nations entitled to pass an *ex post facto* law and punish a criminal under it.

Therefore the Kaiser's defense founded upon this objection is invalid under the general principles of municipal law, and so the projection into international law of the principles of municipal law governing the case presents no barrier to the relief suggested.

The consequence is that, under the circumstances of the case, the Allies are fully justified, on the prin-

ciples of morality and ethics applicable, and the principles as to growth existing in municipal and international law, to meet the novel facts of the unprecedented case arising by the establishment of a new precedent which will advance the growth of international law according to its principles and precedents, and cause the new precedent to be one established in the ordinary way of the growth of all law from precedent to precedent according to principles and theories already existing.

In this way we are fully entitled to meet the breach of a moral truth by a resultant sentence based on the analogies and principles of the growth of all law. And when, in addition, we have the Kaiser's admission—clogged, it is true, by an immaterial other condition and a time limit—of the truth of the moral principles set forth by the Hague Conference, it would seem that the voice of criticism is justly stilled.

Unless considerations of policy prevent this second plan of re-enacting the international law applicable and then dealing with the Kaiser under it, this plan should be the one adopted as being unquestionably the orderly and legal course to pursue.

Respectfully submitted,

Your Obedient Servant,

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